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No. 04-746

In The

Supreme Court of the United States

TONY HARRIS, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

NANO MALDONADO, AN INDIVIDUAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Acting Director of the California Department of Transportation seeks discretionary review of the published opinion of a *unanimous* three judge panel of the Ninth Circuit in *Maldonado v. Harris*, 370 F.3d 945 (CA9 2004). The impressive panel consisted of the Honorable Betty Fletcher, Honorable Stephen Reinhardt, and Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation. The panel *unanimously* denied a petition for panel rehearing and *unanimously* recommended against a rehearing en banc. When advised of the petition for en banc rehearing, *none* of the judges of the full Ninth Circuit even requested a vote. The combined petition for panel and en banc rehearing was denied on August 27, 2004. (See Petitioner's Appendix [P.A.] at 52.)

The Acting Director seeks review of the Ninth Circuit's application of one state, and two federal matters: 1) California's issue preclusion doctrine, 2) the federal rule of accrual for statutes of limitations barring federal actions brought under 42 U.S.C. § 1983, and 3) the jurisdictional *Rooker-Feldman* doctrine.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." (Rule 10, U.S. Supreme Court Rules of Court.) As will be discussed below, there are no compelling reasons to grant certiorari in this case.

II. ARGUMENT

A. THERE IS NO COMPELLING REASON TO REVIEW THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA'S ISSUE PRECLUSION DOCTRINE

1. Petitioner Misstates The California Rule

The Acting Director contends that the California rule for analyzing issue preclusion was stated in *Sutphin v. Speik*, 15 Cal.2d 195 [99 P.2d 652 & 101 P.2d 497] (1940). (See P.B. at p. 15 quoting *Sutphin* at 202.)

However, the Acting Director fails to point out that the *Sutphin* court expressly cautioned in its attached opinion denying rehearing *that its holding should be restricted to the facts of the case*:

> Defendant in his petition for rehearing challenges certain portions of our opinion, which he interprets as meaning that in a second suit on a different cause of action, any issue which could have been raised in the first suit is res judicata in the second, even though not actually determined in the first. *This is not our holding, and the opinion must be read in connection with the facts of this case, and with an understanding of the issue which was, in fact, decided in the former action.*

(*Sutphin* (*supra*) at p. 14 [101 P.2d 497] (*emphasis* added).)

In *Sutphin* the issue which "was, in fact, decided in the former action" was *the division of royalties from specific oil wells under a specific contract.* The losing defendant in the first case was precluded from re-litigating *the division of royalties from the same specific oil wells under the same specific contract* in a second case based

upon evidence which existed, but was not presented, in the first case.

Here, no one is attempting to re-litigate the division of royalties from specific oil wells under a specific contract and thus the Ninth Circuit decision does not conflict with *Sutphin*.

2. The Correct California Rule For Issue Preclusion Requires Issues To Be Actually Litigated

It is basic California hornbook law that there can only be issue preclusion "as to such issues in the second action as were *actually litigated and determined in the first action.*" (*Todhunter v. Smith*, 219 Cal. 690, 695 [28 P.2d 916] (1934) [*emphasis* added].)

Indeed, after *Sutphin* was decided the California Supreme Court reaffirmed that the "aspect of the doctrine of collateral estoppel, is confined to issues *actually litigated.*" (*Clark v. Lehsher*, 46 Cal.2d 874, 880 [299 P.2d 865] (1956) [*emphasis* added] citing *Sutphin v. Speik* (*supra*).) The California Supreme Court reaffirmed the rule even though it admitted that "[i]t is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." (*Ibid.*)

In close cases, it should be remembered that the burden of proof of establishing the defense of issue preclusion is on the defendant. (*McMillian Dev. v. Home Buyers*

Warranty, 68 Cal.App.4th 896, 906 [80 Cal.Rptr.2d 611] (1998) [defendant failed to meet burden]; *Emerson v. Yosemite Gold Mining & Milling Co.*, 149 Cal. 50, 57 [85 P. 122] (1906) ["Where it is sought to show that a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question *may* have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated."] (*emphasis* added) citing *Beronia v. Ventura County Lumber Co.*, 129 Cal. 232-236 [61 Pac. 958] (1900).)

3. Here It Is Undisputed That The Constitutional Issues Were Not Litigated

The Ninth Circuit's opinion in this case expressly states, "At no time did Maldonado raise federal constitutional claims during [the state court] litigation." (See P.A. at pp. 3-4.) Indeed, at one point the Acting Director even admitted that "the District Court's dismissal was based on claim preclusion, *not* issue preclusion. . . . " (Appellee's Opposition Brief to the Ninth Circuit at p. 12. [*emphasis* in original].)

With respect to the trial court, the only issues that were actually litigated by the San Mateo County Superior Court were whether the content of the advertisements posted on Mr. Maldonado's billboard for the Stanford Shopping Center, the Palo Alto Holiday Inn, Skyway Cellular, Golden Time Jewelers, and Stanford University constituted the statutory nuisance known as "off-site advertising" because 1) the advertisers did not have sufficient contacts with the billboard location to be deemed

"on-site advertisers", and 2) the messages displayed on the billboard directed people to goods and services at other locations. (See P.A., pp. 52-56 [*Complaint to Abate Public Nuisance*]; pp. 57-62 [*Answer of Nano Maldonado*]; and pp. 20-23 [*Judgment Granting Injunctive Relief*].)

With respect to the appellate court, the only issues actually litigated were whether 1) the Superior Court had properly construed the California statutes applicable to outdoor advertising, 2) the injunction imposed by the trial court was "sufficiently definite" and "comport[ed]" with the statutes applicable to outdoor advertising, and 3) the trial court acted within its discretion by denying Mr. Maldonado leave to file a claim for inverse condemnation. (See P.A., pp. 24-37 [Published opinion of California Court of Appeal in *People ex rel Department of Transportation v. Maldonado*, 86 Cal.App.4th 1225 [104 Cal.Rptr.2d 66] (2001)].)

Furthermore, to the extent that the Acting Director argues that the correct rule was somehow misapplied, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." (Rule 10, U.S. Supreme Court Rules of Court.)

In any event, conceptually it is difficult to comprehend how Mr. Maldonado could possibly have made an "as applied" challenge in the state court proceeding to billboard messages that were not even conceived of or displayed until *after* the proceeding was completed.

4. The Cases Cited By Petitioner All Involved Issues That Were Actually Litigated

The Acting Director contends that three appellate cases bolster its *Sutphin* arguments (discussed above). As a threshold matter it should be pointed out that lower court decisions in conflict with the California Supreme Court on a matter of state law do not pose a compelling reason for *this* court to intervene – especially where the decision sought to be reviewed relied on a correct statement of the law *as articulated by the state's highest court*. In any event, the cases are distinguishable.

The first case cited is *Takahashi v. Board of Education*, 202 Cal.App.3d 1464 [249 Cal.Rptr. 578] (1988) (cert. denied, 490 U.S. 1011 (1989)). The *Takahashi* case was primarily decided on *claim preclusion* grounds. (See *id.* at 1474-1477 commencing at Heading A ["The Primary Right involved here is the same as in the first action."].) However, the *Takahashi* court also made an alternate holding on issue preclusion grounds and quoted generously from *Sutphin*. But with respect to issue preclusion, the *Takahashi* court merely concluded that *the issue of professional incompetency* (a defense to the § 1983 action) was *actually litigated* in the administrative hearing.

The next case cited by the Acting Director, *Amin v. Khazindar*, 112 Cal.App.4th 582 [5 Cal.Rptr.3d 224] (2003) concerned ownership of real estate. The *Amin* court simply held that the losing defendant in the first action, who had failed to present any evidence of an alleged homestead in that first action, was precluded from re-litigating *the ownership issue* by presenting evidence of the alleged homestead in the second action.

The final case cited by the Acting Director is *Miller v. County of Santa Cruz*, 39 F.3d 1030 (CA9 1994). Like *Takahashi* (*supra*), this case was decided primarily on *claim preclusion* grounds but included an alternate holding on *issue preclusion* grounds. Although the *Miller* court cited to *Takahashi* it relied most heavily upon *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 [5 Cal.Rptr.2d 64] (1992) (disapproved in *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 72 [99 Cal.Rptr.2d 316] (2000) ["we now disapprove that decision"]). But, despite adopting the questionable[1] *claim preclusion* and *issue preclusion* analysis of *Swartzendruber*, one can hardly criticize the actual holding in *Miller* that the *issue of insubordination* (a defense to the § 1983 action) was *actually litigated* in the prior state court proceeding.

Indeed, all three of the cases cited by the Acting Director (*Takahashi*, *Amin*, and *Miller*) all involve the circumstance of a disappointed litigant attempting to relitigate an issue that had already been *actually litigated*.

In conclusion, none of the cases cited by the Acting Director provide a compelling reason for the Supreme Court to exercise its discretion to review this case because

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[1] See *Miller* at 1034-1035 ["To determine whether the 'issue' of Swartzendruber's civil rights had been determined, the court examined the scope of the cause of action 'to determine if it encompasses the same primary right that was at stake in the Commission proceeding.' *Id.* at 71."]. Of course, in California, "primary rights analysis" is applicable to *claim preclusion* – not *issue preclusion*. However, the analytical error does not affect the ultimate outcome and the case that disapproved of *Swartzendruber* actually cited *Miller* with approval in a string of citations to illustrate the point that "[t]he *Westlake* requirement that a party exhaust judicial remedies has been applied in various state and federal decisions. . . . " (See *Johnson* (*supra*) at 70-71.)

here, in contrast to the cases cited by the Acting Director, the issue sought to be precluded was *never actually litigated* in a prior proceeding.

B. THERE IS NO COMPELLING REASON TO REVIEW THE FEDERAL RULE FOR ACCRUAL OF STATUTES OF LIMITATIONS BARRING CIVIL RIGHTS ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

1. Review Of A Correctly Stated Rule Is Not Favored

The Acting Director's second ground for review is that the Ninth Circuit misapplied the federal rule for accrual of statute of limitations barring civil rights actions brought under 42 U.S.C. § 1983. The Ninth Circuit stated the accrual rule as follows:

> Federal law determines when a civil rights claim accrues. Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.

(See P.A. at 17.)

The Acting Director concedes that the rule is correct and that the "Ninth Circuit's decision announced that it follows this accrual rule as well." (P.B. at 19.)

Thus, the Acting Director's argument must be understood as contending that the Ninth Circuit misapplied the rule in the particular circumstances of the case.

So understood, the argument does not provide a "compelling" reason for the Court to review the case because "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication

of a properly stated rule of law." (Rule 10, U.S. Supreme Court Rules of Court.)

2. Petitioner Failed To Raise A Tolling Issue

In any event, the "continuing enforcement" doctrine should logically be understood as an equitable tolling doctrine – not a modification of the federal rule of accrual. State law – not federal law – governs the application of tolling doctrines. (*Hardin v. Straub*, 490 U.S. 536, 543-544 (1989).)

By failing to raise the issue of tolling under state law and failing to cite any decision of the California Supreme Court that conflicts with the Ninth Circuit decision, the issue of tolling should be deemed procedurally forfeited. (Rule 14(a), U.S. Supreme Court Rules of Court; *Seaboard Airline Ry. Co. v. Watson*, 287 U.S. 86 (1932) [construing former Rule 9 and stating that the "purpose is to enable the court, as well as opposing counsel, to readily perceive what points are being relied on" and that the "substitution of vague and general statement for the prescribed particularity sets the rule at naught"].)

3. To The Extent The Ninth Circuit Has Adopted A Special Federal Rule Of Accrual For First Amendment *Prospective Relief* Claims, The Rule Is Justified

The Acting Director argues that "[t]he state court injunction functions as a prior restraint" and that therefore "Maldonado knew with the injunction's issuance that he had suffered injury to his asserted free speech rights." (P.B. 20.)

Although the Acting Director chides the Ninth Circuit for not citing any authority (see P.B. at 21 [ignoring citation to *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1063 (CA9 2002)]), it is somewhat understandable that the question has not been raised in the past. Who else but Caltrans would have the gall to argue that a statute of limitations bars someone from obtaining relief from the *prospective* (i.e. future) enforcement of an unconstitutional statute? (*C.f. Degrassi v. City of Glendora*, 207 F.3d 636 (CA9 2000) [statute of limitations barred recovery of *money damages* for *past* First Amendment violations].)

The Acting Director is essentially arguing that Mr. Maldonado waited too long to object to the Acting Director doing something in the future.

With respect to "as applied" challenges, the Acting Director's rule would mean that at the injunction hearing every person being enjoined would be charged with knowing, raising, and litigating every possible thing he or she ever might want to say that is conceivably within the scope of the injunction – or forfeit the right to freely say those things forever (or for however long the injunction is enforced).

With respect to "general" challenges, the Acting Director's rule would even be more ridiculous. The rationale for statutes of limitation is set forth in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). (See P.B. at 18.) However, in the case of someone challenging the constitutionality of a state statute, none of the articulated risks (i.e. lost evidence, faded memories, disappearing witnesses) are relevant; the constitutionality of a statute is a purely legal matter that does not depend upon evidence, memories, or witnesses.

Nor can the state claim that it might be deprived of the right to be free of such claims; so long as a statute is on the books, it is unreasonable for the state ever to expect repose from constitutional attacks because the fact that one citizen does not assert a challenge in a particular lawsuit does not mean other citizens cannot assert constitutional challenges based upon the same statutes in the future.

Indeed, logic, justice, and good public policy dictate that equitable considerations must afford relief from such a technical defense when a state might otherwise obtain an unconscionable advantage and enforce a forfeiture of an important federal right. What legitimate purpose could possibly be served by denying one plaintiff prospective equitable relief from enforcement of an unconstitutional statute when all other citizens subject to the statute would be free to challenge it?

To the extent the Ninth Circuit articulated a special rule of accrual for First Amendment claims brought under 42 U.S.C. 1983 that arise from injunctions and seek prospective relief, such a rule is justified. (See *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) establishing special rule of accrual for § 1983 claims involving state prisoners ["That makes it unnecessary for us to address the statute-of-limitations issue wrestled with by the Court of Appeals, which concluded that a federal doctrine of equitable tolling would apply to the § 1983 cause of action while state challenges to the conviction or sentence were being exhausted."].)

C. THERE IS NO COMPELLING REASON TO REVIEW THE JURISDICTIONAL *ROOKER-FELDMAN* DOCTRINE

1. *Rooker-Feldman* In The Ninth Circuit

After reviewing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and seven Ninth Circuit cases applying the *Rooker-Feldman* doctrine, the Ninth Circuit in *Noel v. Hall*, 341 F.3d 1148 (CA9 2003) at 1164 formulated the following rule:

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction. . . .

The *Noel* court also held that as a part of its refusal to hear "a forbidden de facto appeal from a judicial decision of a state court" a federal district court "must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision." (*Noel* at 1158.) However, the *Noel* court noted that "[a]s a practical matter, the 'inextricably intertwined' test of *Feldman* is likely to apply primarily in cases in which the state court both promulgates and applies the rule at issue – that is, to the category of cases in which the local court has acted in both legislative and a judicial capacity – and in which the loser in state court later challenges in federal court both the rule and its application." (*Noel* at 1158.)

The *Noel* court noted that "[t]his formulation of the *Rooker-Feldman* doctrine is consistent with the two cases themselves; with all our cases holding that *Rooker-Feldman* bars jurisdiction; with the two long-established rules permitting simultaneous state and federal litigation, and requiring federal courts to apply the preclusion rules of the states under § 1738; and with many (though not all) of the formulations of the *Rooker-Feldman* doctrine in other circuits" including the "similar formulation" articulated by the Seventh Circuit. (*Noel* at 1164 citing *GASH Associates v. Village of Rosemont*, 995 F.2d 726 (CA7 1993) and other Seventh Circuit cases relying thereon.

In general, the *Noel* court identified two scenarios in which *Rooker-Feldman* would likely defeat jurisdiction:

> First, the federal plaintiff may complain of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff, based on an allegedly erroneous ruling by that court. This was the case in *Feldman*, where the local court had refused to grant to the federal plaintiffs a waiver of the local bar admission rule. . . .
>
> Second, the federal plaintiff may complain of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff was one of the litigants. This was the case in *Rooker*, where the state court had already decided a case between two sets of private litigants. The disappointed state court litigants then brought suit in federal court asserting as their legal injury the state court judgment based on an alleged legal error committed by that court. . . .

(*Noel* at 1163.)

The *Noel* opinion was written by the Honorable Judge William Fletcher and was joined by the Honorable Judges Thomas Reavley (Senior Judge of the Fifth Circuit, sitting by designation), and Alex Kozinski. The *Rooker-Feldman* formulation set forth in *Noel* will hereinafter be referred to as the *Noel* formulation.

2. How *Rooker-Feldman* Was Applied Below

In this case, the Ninth Circuit utilized the *Noel* formulation and determined that "the legal wrong that Maldonado asserts in this action is not an erroneous decision by the state court in the nuisance suit brought against Maldonado by Caltrans, but the continued enforcement by [the Acting Director] of a statute Maldonado asserts is unconstitutional." (See P.A. at p. 6.) Indeed, at no time has Mr. Maldonado asserted as a legal wrong an allegedly erroneous decision by a state court; Mr. Maldonado has never asserted that the state court erroneously decided any of the issues that were actually litigated in the state court. (See Argument A, Sec. 3 (*supra*) as to what issues were actually litigated in the state court.)

The Ninth Circuit noted that Mr. Maldonado's prayer seeks "relief from the injunction entered by the state court." (See P.A. at p. 7.) However the Ninth Circuit pointed out that under the *Noel* formulation, "a plaintiff must seek not only to set aside the judgment; he or she must also allege a legal error by the state court as the basis for that relief." (See P.A. at p. 8 quoting *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (CA9 2004).)

Thus, although a federal court was being asked to provide direct relief against a state court judgment, under the *Noel* formulation the Ninth Circuit concluded that Mr.

Maldonado was not bringing a de facto direct appeal and therefore the *Rooker-Feldman* doctrine did not bar subject-matter jurisdiction in the U.S. District Court.

Moreover, since there was no bar to subject-matter jurisdiction, the Ninth Circuit had no occasion to consider whether the *scope* of the jurisdictional bar included just the issues that were actually litigated in the state court action, or extended to other issues that were "inextricably intertwined" with the judgment of the state court. (See P.A. at p. 7 quoting *Noel* at 1158 ["Only when there is already a de facto appeal in federal court does the 'inextricably intertwined' test come into play."].)

3. Petitioner's Contentions

With respect to the *Rooker-Feldman* doctrine, the Acting Director contends that the Ninth Circuit decisions in this case and *Noel v. Hall*, 341 F.3d 1148 (CA9 2003) "reject" and "disregard" the "inextricably intertwined" test utilized in other circuits. (See Petitioner's Brief (P.B.) at p. 8 and fn. 1.) Specifically, the Acting Director contends that the Ninth Circuit fails to "properly focus [its] *Rooker/Feldman* analysis on whether *the effect of the relief requested or the findings of the federal court* would act to reverse, nullify, or modify the state court judgment." (P.B. at p. 10.)

Thus, the Acting Director's arguments are twofold: The general claim is that the Ninth Circuit refused to apply the "inextricably intertwined" test at all, and the specific claim is that the Ninth Circuit failed to use a particularly broad version of the test.

4. Petitioner's Proposed "Effect Of The Relief" Test Is Inconsistent With *Johnson v. Degrandy* And 28 U.S.C. § 1738

With respect to the Acting Director's specific claim that the Ninth Circuit should have applied a broad "effect of the relief" test, it must be pointed out that such a test would be inconsistent with *Johnson v. DeGrandy*, 512 U.S. 997 (1994) and 28 U.S.C. § 1738. (See also *Noel* at 1161 ["We have never in this circuit applied the *Rooker-Feldman* doctrine so broadly as to conflict with either the rule permitting parallel state and federal litigation or the rule of § 1738 requiring federal courts to follow state preclusion rules."].)

In *DeGrandy*, the Florida Supreme Court approved a political redistricting plan and admittedly failed to conduct the "complete factual analysis contemplated by the Voting Rights Act." (*Id.* at 1005.) Thereafter, instead of appealing to the U.S. Supreme Court, the United States and other plaintiffs filed an action in federal court challenging the redistricting plan.

Rooker-Feldman did not defeat jurisdiction for two reasons: First, the United States was not a party to the prior action and thus had not *actually litigated* the federal question in state court. (*Id.* at 1006 ["The United States merely seeks to litigate its § 2 case for the first time. . . ."].) Second, the federal question was not "inextricably intertwined" with the prior state court action because the State Supreme Court had expressly authorized new petitions to be filed. (*Id.* at 1005 [The Florida Supreme Court approved the redistricting plan "without prejudice to the right of any protestor to question the validity of the plan by filing a petition . . . alleging how the plan violates the Voting Rights Act."].)

One of the lessons of *DeGrandy* is that a federal court owes no deference to a state court judgment that the state itself does not regard as a final adjudication. (See *Fontana Empire Center, LLC v. City of Fontana*, 307 F.3d 987 (CA9 2002) citing *Davis v. Bayless*, 70 F.3d 367, 376 (CA5 1995) and *Gauthier v. Cont'l Driving Servs., Inc.*, 831 F.2d 559, 561 (CA5 1987).)

As aptly noted in *Noel*, "The Court's caution in cases after *Rooker* and *Feldman* is understandable in light of two well-established rules that would be in tension with an overly broad reading of the *Rooker-Feldman* doctrine. They are, first, the rule that overlapping or even identical federal and state court litigation may proceed simultaneously, limited only by doctrines of abstention and comity; and, second, the rule of 28 U.S.C. § 1738, under which a federal court must give the same preclusive effect to a state court judgment as the state courts of that state would themselves give to that judgment." (See *Noel* at 1159.)

Here, California law permits collateral challenges to permanent injunctions. Although a *federal injunction* that is not "transparently invalid" or "frivolous" may generally only be attacked as unconstitutional in federal court by direct appellate review, the well-established rule in California is that the unconstitutionality of a *California injunction* can be attacked collaterally regardless of (1) whether the invalidity appears "on the face of the order" and (2) regardless of whether the enjoined party "failed to seek modification or vacation of it." (*In re Berry*, 68 Cal.2d 137 [65 Cal.Rptr. 273, 279-282] (1968) distinguishing *United States v. United Mine Workers*, 330 U.S. 258 (1967) [general federal rule re federal injunctions] and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) [5-4 decision

upholding Alabama rule denying right to collaterally attack injunction that was not void on its face].) Thus, even if an "inextricably intertwined" test were to be applied, *Rooker-Feldman* could not defeat jurisdiction.

Indeed, such a broad statement of the *Rooker-Feldman* doctrine would constitute an unprecedented limitation of federal judicial power. Article III, § 2 of the United States Constitution states that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . . " The power of a District Court to stay state court proceedings is governed by 28 U.S.C. § 2283 which expressly authorizes an injunction against a state court, "where necessary in aid to its jurisdiction, or to protect or effectuate its judgments." Further, the U.S. Supreme Court has held that an injunction issued under 42 U.S.C. § 1983 is an "expressly authorized" exception to limitations contained within 28 U.S.C. § 2283. (*Mitchum v. Foster*, 407 U.S. 225 (1972); see also *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Imperial v. Munoz*, 449 U.S. 54 (1980); see also Fourteenth Amendment, § 5.)

5. The Ninth Circuit's Decision Not To Apply The "Inextricably Intertwined" Test Is Academic Because The First Step Of The Test In Other Circuits Is Identical To The Test That Was Applied

With respect to the Acting Director's general claim that the Ninth Circuit refused to apply the "inextricably intertwined" test at all, it must be pointed out that the only difference between the tests utilized by the Ninth Circuit and the other circuits is one of semantic, and perhaps academic, significance. The difference is that the

Ninth Circuit views its *Noel* formulation as being a first step *before* the "inextricably intertwined" test, whereas the other circuits implicitly or explicitly make their gatekeeping test the "first step" *of* the "inextricably intertwined" test.

Thus, unlike the Ninth Circuit, most circuits tend to jump immediately into their own version of the "inextricably intertwined" test without first independently determining whether they are dealing with a forbidden de facto direct appeal of a state court judgment. However, as a first step in the analysis, these other circuits incorporate their own versions of the *Noel* formulation into the "inextricably intertwined" tests that they employ.

Practically speaking there is no significant difference between the *Noel* formulation and the "inextricably intertwined" test utilized by the other circuits discussed by Petitioner because at some point in each and every case the federal court determined whether the federal plaintiff was alleging a legal error by a state court and requesting relief from the state court judgment based on that legal error.

Analyzing minor semantic differences might make for an interesting law review article by a pedantic law student in academia, but it surely does not present a compelling case for U.S. Supreme Court review. Indeed, the Acting Director fails to present a compelling case for review because he fails to demonstrate that the result in this case would be different if a *Rooker-Feldman* formulation from another circuit were utilized. A review of the cases discussed by the Acting Director is instructive on these points:

a. The Third Circuit

The Acting Director discusses two Third Circuit cases in support of his position: *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (CA3 1996) and *E.B. v. Verniero*, 119 F.3d 1077 (CA3 1997).

In *FOCUS*, an advocacy group wanted to intervene in a high-profile child custody case for the limited purpose of challenging the trial judge's gag order. "In a quick series of events, (1) the court of common pleas rebuffed FOCUS' attempt to intervene, (2) the Pennsylvania Superior Court refused to entertain FOCUS' motion for a writ of mandamus, and (3) the Pennsylvania Supreme Court denied FOCUS' petition to exercise its King's Bench jurisdiction to declare the gag orders unconstitutional. FOCUS then joined forces with the two individual plaintiffs and filed this § 1983 suit in federal district court, alleging that the state court and its judge violated their First Amendment rights." (*Id.* at 836-837.)

The Third Circuit stated the applicable rule as follows, "*Rooker-Feldman* applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual." (*Id.* at 840 citing *Marks v. Stinson*, 19 F.3d 873, 886 n. 11 (3d Cir.1994) [holding *Rooker-Feldman* inapplicable where "the district court could (and did) find that [the plaintiffs'] constitutional claims had merit without also finding that the [state] court erred"].)

Although a declaration by the federal court in *FOCUS* that the state court gag order was unconstitutional would have "rendered that judgment ineffectual", the *FOCUS* court found *Rooker-Feldman not* applicable because (1) the

trial court judge "did not decide FOCUS' constitutional challenge to the gag orders or any other issue that is a predicate to the claim in the federal proceeding" (*id.* at 841), and (2) the Supreme Court merely chose not to exercise its extraordinary jurisdiction and "[n]ot only is the district court being asked to adjudicate an issue distinct from any the Supreme Court of Pennsylvania expressly adjudicated, it is also being asked to grant relief that is entirely consistent. . . . " (*Id.* at 842.) In short, a party in the state court was not asking the federal court to determine whether the state court was wrong.

Thus, call it what you may, the formulation used by the Third Circuit is essentially the same as the *Noel* formulation.

The other Third Circuit case discussed by the Acting Director also does not help him. *E.B. v. Verniero* (*supra*) concerned a challenge to "Megan's Law" – the sex-offender notification law. The sex offender challenged his "notification plan" and "advanced federal constitutional arguments" in the trial court. The challenges were rejected and thereafter he appealed to the Appellate Division, which affirmed. The Supreme Court of New Jersey thereafter denied the sex offender's petition for certification of appeal. Then, instead of appealing to the United States Supreme Court, the sex offender filed a case in U.S. District Court raising the same constitutional arguments and seeking "an injunction directing that the notification ordered by the New Jersey Superior Court, Law Division, not be carried out." (*Id.* at 1090.)

The Third Circuit recognized the case as a "paradigm" *Rooker-Feldman* situation because "[t]o grant [the sex offender] relief would require an inferior federal court to

determine that the New Jersey court's judgment was erroneous and would foreclose implementation of that judgment." (*Id.* at 1091 citing *FOCUS* (*supra*).) In addition, the Third Circuit refused to countenance the arguments that the state courts did not genuinely consider the sex offender's arguments and that the existence of adverse case law in the state provided a legitimate reason for the sex offender to abandon the normal avenue of appeal. (*Id.* at 1091.)

Thus, the Third Circuit determined that the sex offender was claiming a legal error by the state court, and seeking relief from the judgment based on that error – a paradigm example of the *Noel* formulation.

b. The Seventh Circuit

The Seventh Circuit case discussed by the Acting Director is *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726 (CA7 1993). In *GASH*, a village instituted a condemnation proceeding while a foreclosure was pending and then bought the subject property at the foreclosure sale. One of lenders that had its security interest wiped out by the foreclosure sale objected to the state trial court's confirmation of the foreclosure and appealed to the state court of appeals, arguing that the village had essentially "taken" the property in violation of the Fifth Amendment to the U.S. Constitution because instituting the condemnation proceeding devalued the property and scared off prospective bidders. After losing the appeal, the disappointed lender filed a claim in federal court advancing the same claims it had made in the state court of appeal.

The Seventh Circuit stated the rule as follows, "[I]s the federal plaintiff seeking to set aside a state judgment,

or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." (*GASH* at 728 [citation omitted].)

Applying this rule, the Seventh Circuit noted that the lender's injury "came from the judgment confirming the sale, rather than requiring the Village to condemn the building independently of the foreclosure, as [the lender] had demanded. Both trial and appellate courts in Illinois considered and rejected this position on the merits. The appellate court expressly rebuffed [the lender's] contention that the pending condemnation action unduly depressed the price realized in the auction. Only the Supreme Court of the United States was authorized to review that decision." (*GASH* at 729.)

Thus, the Seventh Circuit found that the federal plaintiff in *GASH* was asserting as a legal wrong an allegedly erroneous decision by the state court, and was seeking relief from the state court judgment based on that decision. This is the precise test set forth in the *Noel* formulation. (See *Noel* at 1164 ["Of the formulations in the other circuits, we find most notable (and most useful) the similar formulation of the Seventh Circuit, first articulated at some length by Judge Easterbrook in *GASH*. . . ."].)

c. The Tenth Circuit

The Acting Director noted that *GASH* was "cited with approval" by the Tenth Circuit in *Kenman Engineering v. City of Union*, 314 F.3d 468 (CA10 2002).

In *Kenman Engineering* a city sought and obtained a permanent injunction against a business in state court mandating that it store its magnesium in compliance with all applicable local, state, and federal laws. Apparently unable to comply with the local ordinance, the business sold the magnesium at a loss. Thereafter, the business filed a federal action for damages alleging that the city's action in the particular case amounted to an unconstitutional taking of property without due process of law and that the city ordinance should have been preempted.

The Tenth Circuit upheld dismissal upon *Rooker-Feldman* grounds stating, "[W]e approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress. If it did, *Rooker-Feldman* deprives the federal court of jurisdiction." With respect to the due process claim, the Tenth Circuit noted that "plaintiffs seek monetary damages attributable to losses they sustained as a result of being forced – by state-court order – to remove magnesium from their Union City storage facility. Plaintiffs do not request any form of prospective declaratory or injunctive relief." With respect to the preemption claim, the Tenth Circuit noted that "the injury for which plaintiffs seek redress is not the possibility of Union City applying its municipal fire code against them in the future. Rather, plaintiffs seek damages for Union City's past application of its municipal fire code – an application sanctioned in a prior state-court judgment."

Thus, in its own way, the Tenth Circuit determined whether the plaintiff was asserting as a legal wrong the erroneous decision of a state court and seeking relief from the judgment based upon those errors. Unquestionably, the answer to both questions was yes and thus, consistent with the *Noel* formulation, federal jurisdiction was defeated.

d. The Eighth Circuit

The Eighth Circuit case discussed by the Acting Director is *Charchenko v. City of Stillwater*, 47 F.3d 981 (CA8 1995).

In *Charchenko* a former police officer filed a lawsuit in state court alleging wrongful termination and denial of due process. The state court action was dismissed for lack of subject-matter jurisdiction and the former police officer then re-filed the same case in federal court where it was dismissed under the *Rooker-Feldman* doctrine.

In reviewing the federal dismissal, the Eighth Circuit stated that "to determine whether *Rooker-Feldman* bars Charchenko's federal suit requires determining exactly what the state court held and whether the relief requested by Charchenko in his federal action requires determining the state court's decision is wrong or would void its ruling. If the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit." (*Charchenko* at 983.)

The Eighth Circuit examined the state court proceedings and determined that the state courts had ruled that

"state trial courts do not have subject matter jurisdiction to review a municipality's decision to terminate a city employee." (*Charchenko* at 983.)

With respect to the constitutional claims, the Eighth Circuit ruled that even assuming the state court lacked subject-matter jurisdiction to consider the constitutional claims (a dubious proposition, see *Charchenko* at fn. 2), federal jurisdiction was not defeated because the state court decision did not purport to define federal jurisdiction and "[t]he deprivation of state court subject matter jurisdiction in Sec. 1983 suits does not affect the federal district court's original jurisdiction." (*Charchenko* at 983-984.)

The Eighth Circuit also stated that "[t]he choice of whether to proceed in a state or federal forum . . . necessarily belongs to the plaintiffs and they cannot be deprived of it by a state rule which gives preclusive effect to unappealed state administrative decisions." (*Charchenko* at 984 [citations and internal quotations omitted].)

Thus, as to the federal claim, the Eighth Circuit's approach was similar to the *Noel* formulation because it determined that the federal plaintiff was not alleging an erroneous decision by the state court and seeking relief based thereon.

With respect to the state law wrongful termination claims, the Eighth Circuit noted that the federal plaintiff "did not pursue any administrative remedies in state court [and] [t]his failure caused the state trial court to determine that it had no subject matter jurisdiction to hear the merits of . . . Charchenko's state wrongful termination claims. . . ." (*Charchenko* at 984.)

Since the federal plaintiff did not advance any independent basis for alleging wrongful termination, the Eighth Circuit construed the federal complaint as alleging that the state court had committed an error as to its determination of subject-matter jurisdiction and that the federal plaintiff was requesting damages based upon that error. (See *Charchenko* at 984, "allowing the district court to apply state law to the merits of Charchenko's wrongful termination claim would effectively void" the determination that the federal plaintiff had failed to exhaust administrative remedies.)

In any event, *Charchenko* is not on point in this case because Mr. Maldonado is not attempting to present in federal court any state law claim that was dismissed in state court for lack of subject-matter jurisdiction.

III. CONCLUSION

For the reasons stated above, there are no compelling reasons for the United States Supreme Court to grant certiorari in this case. The Acting Director fails to carry his burden of demonstrating a clear conflict between the Ninth Circuit's decision in this case and a decision of the California Supreme Court. Moreover, any difference between the Ninth Circuit and other circuits are academic or semantic rather than substantive. In addition, the Acting Director fails to demonstrate that the result would be different if the formulations of other circuits were utilized. Finally, the formulation suggested by the Acting Director appears to conflict with Congressional statutes and precedent of the United States Supreme Court.

Mr. Maldonado should, for the first time, be permitted to present his First Amendment claims for *prospective*

relief against the Acting Director of the California Department of Transportation in the forum of his choosing. Mr. Maldonado suffers irreparable harm the longer he is denied his day in court. A right deferred is a right denied.

Respectfully submitted,

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